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No. 90-1378

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES GYPSUM COMPANY, ET AL.,
Petitioners

v.

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,
And A Conditionally Certified Class,
Respondents

and

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent

IN RE ASBESTOS SCHOOL LITIGATION
D.C. Master File No. 83-0268

Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PFIZER INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRITS OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	1
SUMMARY OF THE ARGUMENT	2
INTEREST OF THE AMICUS CURIAE	2
ARGUMENT	3
I. The Lower Courts' Holdings Are a Radical Departure from 200 Years of Pleadings Practice Regarding the Time for Ascertaining the Jurisdiction of a District Court	4
II. The Lower Courts' Holdings Will, Unless Reversed, Eviscerate the "Amount in Controversy" Requirement	5
III. The Lower Courts' Holdings Create a "National State Law Class Action" Exception to the Complete Diversity Requirement of 28 U.S.C. § 1332	6
IV. The Supreme Court Should Decide These Critical Issues Now, Before the System Becomes Drastically Overloaded	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 4

Bingham v. Cabot, 3 U.S. (3 Dall.) 382 (1798) 4

Employers Ins. of Wausau v. Crown Cork & Seal Co., 905 F.2d 42 (3d Cir. 1990) 4

Finley v. United States, 490 U.S. 545 (1989) 7

Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978) 6

Snyder v. Harris, 394 U.S. 332 (1969) 7

Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) ... 6

Turner v. President, Directors & Co. of Bank of North America, 4 U.S. (4 Dall.) 8 (1799) 4

United States Gypsum Co., et al., Petitioners, v. Barnwell School District No. 45, et al., Respondents, 921 F.2d 1310 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3615 (U.S. March 4, 1991) 2

Zahn v. International Paper Co., 414 U.S. 291 (1973) 3, 5, 6

STATUTES AND RULES

28 U.S.C. § 1332 ..... 2, 3, 5, 6, 7

Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (partly codified as amended at 28 U.S.C. § 1332) 6

Fed. R. Civ. P. 8(a)(1) 4

Fed. R. Civ. P. 12(d) 3, 4, 5

Fed. R. Civ. P. 23 ..... 3, 6, 7

Fed. R. Civ. P. 82 7

OTHER AUTHORITY

H.R. Rep. No. 100-889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982 7

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QUESTION PRESENTED

Whether the federal district and circuit courts may use the Federal Rules of Civil Procedure to expand diversity jurisdiction so as to retain jurisdiction over a national state law class action asserting property damage claims even though it is undisputed: (a) that there has been no allegation in the plain-

tiffs' complaints that any absent class member has a jurisdictionally sufficient amount in controversy; (b) that hundreds, perhaps thousands, of the members of the class cannot meet the "amount in controversy" requirement of 28 U.S.C. § 1332; and (c) that some undetermined number of absent class members are not diverse from the defendants from which they seek recovery.

SUMMARY OF THE ARGUMENT

The petition for certiorari is not a run-of-the-mill petition. The decisions below, because they substantially alter the fundamental requirements for diversity jurisdiction, and affect how and when federal jurisdiction is to be determined, have a pervasive and far reaching impact on the administration of justice nationwide that extends well beyond the boundaries of this particular litigation, important as it alone may be. The opinions of the lower courts represent a major expansion of federal court jurisdiction through the creation of a "national state law class action" exception to the limits on diversity jurisdiction. In addition, they radically alter the rule as to when the jurisdiction of a federal district court must be determined.

INTEREST OF THE AMICUS CURIAE

This brief, which urges the Court to grant writs of certiorari to review the issues raised by *United States Gypsum Co., et al., Petitioners, v. Barnwell School District No. 45, et al., Respondents*, 921 F.2d 1310 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3615 (U.S. March 4, 1991) (No. 90-1378), is submitted by Pfizer Inc.[1] Pfizer is a defendant in *In re Asbestos School Litigation*, D.C. Master File No. 83-0268 (E.D. Pa.), but was not a party to the proceedings in the Third Circuit on the issues raised in the petition for certiorari and addressed here.

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1. All parties have consented in writing to the filing of this brief, and the written consents have been filed with the Clerk of the Court.

Pfizer's immediate interest in the petition arises from the prospect of being required to defend a complicated, multi-phased jury trial that may take many months to complete against a class in which hundreds, perhaps thousands, of the absent class members are not properly before the district court. Defending the trial of this case would cause Pfizer, as well as the many other companies similarly situated, substantial and unwarranted expense.

ARGUMENT

The requirements for diversity jurisdiction are clear and, before the decisions by the district court and court of appeals, were well settled for decades: a plaintiff in a federal district court case must allege in good faith that his claim exceeds $10,000[2] and that he is a citizen of a state different from that of each defendant. 28 U.S.C. § 1332. *See Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But the courts below have circumvented these bright line limitations by distorting Rule 12(d) and Rule 23 of the Federal Rules of Civil Procedure to create a "national state law class action" exception to these clear limits on diversity jurisdiction. Federal courts are not free to do this through the Federal Rules of Civil Procedure or any other device.

The exact manner in which the lower courts' decisions have carved out these exceptions are extensively explained in the petition for certiorari, and will not be repeated here. However, the expansionary effect on federal jurisdiction of the lower courts' actions and the long-standing countervailing policies that these actions unilaterally override do merit review by this Court.

We shall address the critical issues dealing with the timeliness of determining jurisdiction, the amount in controversy distortion, and the complete diversity aberration, seriatim.

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2. During the pendency of this action the jurisdictional requirement was raised from $10,000 to $50,000. *See Pet. App.* at 11a.

I. The Lower Courts' Holdings Are a Radical Departure from 200 Years of Pleadings Practice Regarding the Time for Ascertaining the Jurisdiction of a District Court.

Until this case, a complaint filed in a United States district court was required to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." Fed. R. Civ. P. 8(a)(1). This is a logical and necessary requirement given that the federal courts are courts of limited jurisdiction.

Further, the orderly administration of justice, as well as the commands of this Court, require that jurisdiction be examined at the initial stage of a case. *See Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). That has always been the rule enunciated by this Court. *See e.g., Bingham v. Cabot*, 3 U.S. (3 Dall.) 382 (1798); *Turner v. President, Directors & Co. of Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799). And indeed, as is pointed out in Judge Cowen's dissent below, it was the rule applied by the Third Circuit as well—at least until this litigation. *Pet. App.* at 26a, *citing Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 905 F.2d 42, 45 (3d Cir. 1990) ("a federal court is bound to consider its own jurisdiction preliminary to consideration of the merits.")

The courts below departed from this age-old and commonsense rule through a fanciful reading of Rule 12(d) of the Federal Rules of Civil Procedure. But this stratagem serves no purpose other than to expand improperly the lower courts' jurisdiction. Under the guise of maintaining jurisdiction only provisionally until the jurisdictional issue can be resolved at some undefined point during or at the end of trial, the district court has, in fact, expanded its jurisdiction by presiding over a huge class of plaintiffs, issuing binding orders, dismissing parties, granting summary judgments, approving settlements, disbursing settlement funds to plaintiffs' counsel, and entering final judgments, all in a case where the plaintiffs have failed to make an allegation in their complaints suffi-

cient to invoke the district court's jurisdiction. *Pet. App.* at 23a-24a.

If, under this newly devised approach, jurisdictional questions can be delayed until the end of trial, then the federal courts will no longer be courts of limited jurisdiction. Indeed, carried to its logical conclusion, the district courts would be free to hear almost any state law case from start to finish. The only limitation would be that, should a district court decide at time of judgment that it never had jurisdiction, it would then have to declare the proceeding null and void and dismiss it as an expensive and regrettable error.

Rule 12(d) simply does not provide a basis for turning pleading practice on its head and subverting the mandate of 28 U.S.C. § 1332. Such a fundamental alteration must be the product of determinations by Congress or this Court, not the case specific concerns of lower courts.

II. The Lower Courts' Holdings Will, Unless Reversed, Eviscerate the "Amount in Controversy" Requirement.

In *Zahn*, this Court squarely held that "... any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims." 414 U.S. at 300. Despite this holding, the courts below have not even attempted to identify or dismiss plaintiffs who admit that they cannot allege, much less prove, that they have $10,000 in damages. Keeping many hundreds of school districts in a case where they cannot meet the most basic prerequisites of diversity jurisdiction is an unprecedented expansion of the federal courts' jurisdiction.

In essence, the lower courts' holdings create a new mechanism by which diversity plaintiffs may aggregate claims and evade the holding of *Zahn*. Again, it is clear that hundreds of the class members do not meet the "amount in controversy" requirement. *Pet. App.* at 23a-24a. Under this new jurisdictional scheme, as long as *some* members of the class can

allege the jurisdictional amount in controversy in good faith, any number of additional plaintiffs can join and remain in the suit, perhaps until a final judgment is entered.

But this Court has already stated emphatically that aggregation of claims is improper and that "one plaintiff may not ride in on another's coattails." *Zahn v. International Paper Co.*, 414 U.S. at 301. The lower courts' holdings are a departure from the mandates of this Court's prior opinions. Only this Court can review and reverse this departure and thereby prevent this clear expansion of diversity jurisdiction.

III. The Lower Courts' Holdings Create a "National State Law Class Action" Exception to the Complete Diversity Requirement of 28 U.S.C. § 1332.

The lower courts have also broken from the 200 year old requirement that there must be complete diversity between all plaintiffs and all defendants. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The Third Circuit declared that "only the citizenship of the named class representatives must be diverse from that of the defendants." *Pet. App.* at 15a. In essence, the Third Circuit has found in Federal Rule of Civil Procedure 23 an exception to the "complete diversity" requirement of 28 U.S.C. § 1332. Such an exception is a major expansion of federal jurisdiction, running counter to this Court's interpretation of 28 U.S.C. § 1332, *see Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978), and the historical trend toward limiting diversity jurisdiction.

At the time this suit was filed in 1983, each plaintiff seeking to gain access to federal court pursuant to diversity jurisdiction was required to allege that it had a claim in excess of $10,000. (Since then, diversity jurisdiction has been limited to plaintiffs who can allege $50,000 in damages.) As the increase of the "amount in controversy" requirement signals, and as even the Third Circuit acknowledges, there has been considerable debate concerning whether diversity jurisdiction should be maintained at all. *Pet. App.* at 18a-19a, *citing Judicial Improvements and Access to Justice Act*, Pub. L. No.

100-702, 102 Stat. 4642 (1988) (partly codified as amended at 28 U.S.C. § 1332); H.R. Rep. No. 100-889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 5987-88.

Despite this, the Third Circuit inexplicably has interpreted Congress' carefully crafted compromise, which narrowed diversity jurisdiction, as a green light for the district courts to expand diversity jurisdiction. Certainly, diversity jurisdiction should not be broadened through lower court manipulation of Rule 23. Indeed, it is clear that the Federal Rules of Civil Procedure can not expand the federal courts' jurisdiction; Rule 82 specifically so provides. *See Finley v. United States*, 490 U.S. 545 (1989) (*citing* Federal Rule of Civil Procedure 82). The present petition gives this Court a clear opportunity to stop the lower courts from misusing Rule 23 to expand diversity jurisdiction, and it should do so.

IV. The Supreme Court Should Decide These Critical Issues Now, Before the System Becomes Drastically Overloaded.

The major expansion of diversity jurisdiction brought about by the courts below is not something that should be left for future consideration. Nationwide diversity class actions threaten to clog the federal system with what are essentially state law claims. The scarce court resources that this very case has already consumed are staggering. Unless stopped by this Court, this trend will continue and increase.

Whether the federal courts are to become the custodians of these cases has become a question of national importance that will have enormous effects on the administration of justice. A denial of certiorari here will invite plaintiffs to pursue more state law claims in the federal courts, and will signal to the district courts that such filings are perfectly acceptable.

As this Court explained in *Snyder v. Harris*, 394 U.S. 332, 341 (1969), "... there is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already

overloaded federal court system." Similarly, there is no compelling reason for the lower courts to depart from the prior holdings of this Court in order to saddle an already overloaded federal system with state law products liability cases that have, historically, been adjudicated in the state courts.

In addition to the widespread effects of the holdings of the courts below, the present matter deserves the Court's review because of the nature of the changes the lower courts have created. The scope of diversity jurisdiction is the exclusive province of Congress and this Court. Changes in this area frequently are more important than interpretation of substantive law because jurisdictional questions go to the heart of the power of the district courts and the nature of our federal judicial system. As such, this Court should act now to review and resolve this urgent matter of national importance.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted,

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